United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1907.

No. 1779. 488

HORACE S. CUMMINGS, ADM'R, APPELLANT,

vs.

CHARLES F. CONSAUL AND IDA M. MOYERS, ADMINISTRATORS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 16, 1907.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1907.

No. 1779.

HORACE S. CUMMINGS, ADMINISTRATOR OF THE ESTATE OF GEORGE B. EDMONDS, DECEASED, APPELLANT,

vs.

CHARLES F. CONSAUL AND IDA M. MOYERS, ADMINISTRATORS OF THE ESTATE OF GILBERT MOYERS, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 19, 1907.

In the Court of Appeals of the District of Columbia.

No. 1779.

HORACE S. CUMMINGS, Adm'r, Appellant,
vs.
CHARLES F. CONSAUL ET AL., &c.

a Supreme Court of the District of Columbia.

No. 20802. In Equity.

HORACE S. CUMMINGS, Administrator of the Estate of George B. Edmonds, Deceased, Complainant,
vs.
CHARLES F. CONSAUL and IDA M. MOYERS, Administrators of the Estate of Gilbert Moyers, Deceased, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled case, to wit:—

1 *Exceptions of the Complainant to Report of Auditor, &c.*

Filed May 31, 1906.

In the Supreme Court of the District of Columbia, Holding an Equity Court for Said District.

Equity. No. 20802.

HORACE S. CUMMINGS, Administrator of the Estate of George B. Edmunds, Deceased, Plaintiff,
vs.
CHARLES F. CONSAUL ET AL., Administrators of the Estate of Gilbert Moyers, Deceased, Defendant.

First Exception.—To so much of said report as allows the defendants credit for one-half of the alleged expenses incurred by their intestate (as set forth in Exhibit R. G. D. No. 1 filed before the Auditor) in the preparation and filing of documents such as calls

and motions in the Court of Claims, on the grounds following, to wit:

(*a*) That said documents consisted of printed blanks which were filled in by said intestate, or by his clerks, and as there is no testimony to show the cost of such printing and the time required to fill in said blanks, it was improper to fix an arbitrary amount, as was done, for the preparation and filing thereof and to give the defendants credit therefor in this accounting.

(*b*) That the expenses incurred by the defendants' intestate, if any, in the preparation and filing of said documents were part of the office expenses of said intestate for no part of which his es-
2 tate is entitled to credit in this accounting.

Second Exception.—To so much of said report as finds that a fee of ten per cent. (10%) of the amount of the recovery in the claim of the estate of Thomas Kidd is a fair and reasonable allowance to local counsel employed by Gilbert Moyers, deceased, and charges the complainant with an amount equal to one-half of said ten per cent. (10%) upon the grounds following, to wit:

(*a*) That by a proper construction of the partnership agreement of February 6th, 1888, between George B. Edmunds, deceased, and Gilbert Moyers, deceased, the said Moyers was not, and the defendants as his administrators are not entitled, under the circumstances, to credit for more than one-half of two and one-half per cent. of the amount of any allowed claim embraced in the partnership, when the expenses incurred by said Moyers exceeded that per centage; and such having been the case in the matter of the said Kidd claim the maximum amount allowable to the defendants is one-half of two and one-half per cent. of the amount paid by the United States in settlement of said claim, or $168.25.

(*b*) That no reason having been shown by said defendants or their intestate why local counsel (if the employment of such local counsel was necessary) should not have been paid a per diem compensation for their services as was done by the said intestate in the prosecution of many of the other partnership claims, and no reason having been given for such employment on the basis of a contingent fee, it was improper to fix as a reasonable compensation to local counsel a per centage of the recovery arbitrarily fixed
3 and agreed to be paid by said intestate.

(*c*) That there is not in the record of testimony taken before the Auditor or elsewhere, competent or admissible testimony showing, or tending to show, that ten per cent. of the recovery was a reasonable fee to be paid local counsel.

Third Exception.—To so much of the said Auditor's report as finds that the fee of one hundred dollars ($100) is a fair and reasonable allowance to local counsel employed by the defendants' intestate to assist him in the prosecution of the claim of the estate of Isaiah Beans and charges the complainant with one-half of said one hundred dollars ($100), upon the grounds following, to wit:

(*a*) That by a proper construction of the partnersip agreement of February 6th, 1888, between George B. Edmunds, deceased, and Gilbert Moyers, deceased, the said Moyers was not, and the defendants

as his administrators, are not entitled, under the circumstances, to credit for more than one-half of two and one-half per cent. of the amount of any allowed claim embraced in the partnership, when the expenses incurred by said Moyers exceeded that per centage and such having been the case in the matter of the said Beans claim the maximum amount allowable to the defendants is one-half of two and one-half per cent. of the amount paid by the United States in settlement of said claim, or $16.00.

(*b*) That no reasons having been shown by the defendants or their intestate why local counsel (if the employment of such was necessary) should not have been paid a per diem compensation for their services as was done by said intestate in the prosecution of many of the other partnership claims, in fixing the amount of compensation to be allowed for the employment of such counsel, the Auditor should have ascertained and found what would have been a fair and reasonable per diem compensation to be paid local counsel in the prosecution of said Beans claim.

(*c*) That there is not in the record of the testimony taken before the Auditor, or elsewhere, any competent or admissible testimony showing or tending to show that one hundred dollars ($100) was a fair and reasonable fee to be paid local counsel in the prosecution of said Beans claim, but that on the contrary as the testimony shows that the evidence taken by said local counsel consisted of only three printed pages of testimony, such allowance of one hundred dollars ($100) was unjust to the complainant and unreasonable.

Fourth Exception.—To so much of the said Auditor's Report as charges the defendants with one-half of four hundred and ninety-two dollars ($492) the fee received by their intestate in the matter of the claim of Joel C. Johnson administrator of Richard W. Johnson, instead of one-half of nine hundred and eighty-four dollars, the amount of fee that he should have received under the contract between George B. Edmunds, deceased and the claimant on the grounds following, to wit.

(*a*) That the employment of local counsel by said intestate was expense incurred by said intestate in the prosecution of said claim and under the said partnership agreement of February 6th, 1888, said intestate was not entitled, nor are his administrators entitled, under the circumstances to credit for more than one-half of two and one-half per cent. of the amount allowed in settlement of said claim.

(*b*) That it was beyond the power of Gilbert Moyers, deceased, to bind the estate of his deceased partner to pay local counsel one-half of the fee of 50% provided for in the contract between said deceased partner and the claimant and having paid such counsel one-half of said fee, his administrators are not entitled to credit for such payment in this accounting with the estate of his deceased partner.

TUCKER & KENYON,
Attorneys for Complainant.

Complainant's Exceptions to Report of Auditor of Jan. 4, 1907.

Filed January 4, 1907.

In the Supreme Court of the District of Columbia.

In Equity. No. 20802.

HORACE S. CUMMINGS, Administrator of the Estate of George B. Edmunds, Deceased, Complainant,
vs.
CHARLES F. CONSAUL ET AL., Administrators of the Estate of Gilbert Moyers, Defendants.

Comes now the complainant in the above entitled cause and excepts to so much of the report of the Auditor filed January
6 4th, 1907, as charges the former partnership between said Edmonds and said Moyers with the payment of the $201.90 paid the intervenor, George M. Barber, upon the ground that said payment is properly chargeable against the estate of said Moyers alone, and the share of the complainant, as administrator of the said Edmonds, in the fee earned and received in the matter of the estate of Thomas Kidd cannot properly be reduced under the partnership contract by a contract made by said Moyers without the knowledge or consent of the said Edmonds, or any one representing him.

TUCKER & KENYON,
Solicitors for Complainant.

7 *Decree.*

Filed January 8, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 20802.

HORACE S. CUMMINGS, Administrator of the Estate of George B. Edmonds, Complainant,
vs.
CHARLES F. CONSAUL and IDA M. MOYERS, Administrators of the Estate of Gilbert Moyers, Defendants.

This cause coming on to be heard upon the report of the Auditor of the Court filed May 1st, 1906 and the exceptions thereto of the complainant and the defendants; upon the report of the Auditor filed December 21st, 1906, and the exceptions thereto of the defendants, and upon the report of the Auditor filed January 4th, 1907, and the exceptions thereto of the complainant, and the parties having consented to the immediate hearing of said exceptions it is, by

the court, this 8th day of January, 1907, adjudged, ordered and decreed as follows, to wit:

1. That each and every of said exceptions be, and the same is hereby, overruled, and said reports be, and the same are hereby, finally ratified and confirmed.

2. That the complainant, as shown by the said report of the Auditor filed May 1, 1906, is entitled to recover from the defendants,
as administrators of the estate of Gilbert Moyers, the sum of
8 $12,813.74, being the sum found to be due the complainant,
as of September 16, 1899, namely, $8,906.68, with interest thereon to the date hereof; also the sum of $311.72, being the sum found to be due the complainant on account of the fee collected by defendants' intestate, Gilbert Moyers, in the case of Joel C. Johnson, Administrator of Richard W. Johnson, namely, $246, with interest thereon from July 25, 1902, to the date hereof; and also the sum of $964.99 being the sum found to be due the complainant by the said report of the Auditor filed December 21st, 1906, or a total of $14,090.45, with interest until paid.

3. That of the sum of $480.10 remaining of the $682 heretofore retained by the receivers herein pending the determination of the claim of George M. Barber, intervenor, as shown by the said report of the Auditor filed January 4th, 1907, after payment of the sum of $201.90 to said Barber as directed by the order of the Court made December 26th, 1906, the complainant is entitled to one-half, namely, $240.05 and the defendants to one-half, namely, $240.05.

4. That of the balance of the sum $6,430.82, in the hands of said receivers, as shown by said report of said Auditor filed May 1, 1906, after deducting $152, costs of references and also said $682 retained by said receivers distribution of which is hereinbefore provided for, which said balance amounts to $5,596.82, the complainant, as shown by said last mentioned report, is entitled to the sum of $1,896.05 and the defendants to the sum of $3,700.77.

5. That the said receivers be, and they are hereby directed
9 to pay over forthwith to the said complainant the sums of
$1,896.05 and $240.05 found to be due by the Auditor's reports filed May 1, 1906, and January 4th, 1907, and also the sums of $3,700.77 and $240.05 found to be due the defendants by said last mentioned reports, which said sums of $3,700.77 and $240.05 shall, when paid, be credited upon the sum of $14,090.45, due the complainant from the defendants according to the provisions of Paragraph 2 hereof, leaving a balance due the complainant from the defendants on account thereof of $10,149.63, which last mentioned sum the complainant shall recover from the defendants, as administrators as aforesaid, as of the date hereof, together with the costs of suit, to be taxed by the Clerk, and have execution therefor as at law.

6. That this cause be, and the same is hereby retained, and the right saved and reserved to the complainant to apply to this Court from time to time for an order or orders for the payment of such other and further sums of money as have or shall come into the hands of the defendants, as administrators of Gilbert Moyers, deceased, on account of the partnership heretofore adjudged to have

existed between the said deceased and the said George B. Edmonds, deceased, or into the hands of the said receivers, and which may or shall be due the complainant, as administrator of said George B. Edmonds, by reason of said partnership.

HARRY M. CLABAUGH,
Chief Justice.

10 From the foregoing decree the defendants in open court pray an appeal to the Court of Appeals of the District of Columbia, which is hereby allowed, and the penalty of the appeal bond, if one is given to operate as a supersedeas, is hereby fixed at Fifteen thousand dollars ($15,000), and if it is to act as a bond for costs only, then in the sum of Two hundred dollars.

HARRY M. CLABAUGH,
Chief Justice.

11 *Order for Appeal.*

Filed January 23, 1907.

In the Supreme Court of the District of Columbia, the 23rd Day of January, 1907.

Equity. No. 20802.

HORACE S. CUMMINGS, Administrator, &c., Complainant,
vs.
CHARLES F. CONSAUL ET AL., Administrators, Defendants.

The Clerk of said Court will enter an appeal on behalf of the complainant from the decree of the Court of the 8th day of January, 1907, and issue citation to the defendants.

TUCKER & KENYON,
Attorneys for Complainant.

12 In the Supreme Court of the District of Columbia.

No. 20802. In Equity.

HORACE S. CUMMINGS, Adm'r,
vs.
GILBERT MOYERS.

The President of the United States, to Charles F. Consaul & Ida M. Moyers, administrators, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal from a decree of the Supreme Court of the District of Columbia, on the 8″ day of January, 1907, wherein Horace S. Cummings Adm'r is Appellant, and you are Appellee-, to show cause, if

any there be, why the Decree—rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 23″ day of January in the year of our Lord one thousand nine hundred and seven.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Service of the above Citation accepted this 23d day of January, 1907.

R. GOLDEN DONALDSON,
Attorney for Appellee.

[Endorsed:] No. 20802 *Law.* Equity. Cummings *vs.* Consaul. Citation. Issued Jan. 23″, 1907.

13 *Memoranda.*

January 25, 1907.—Appeal Bond,—filed.

March 8, 1907.—Time extended from time to time to file transcript of Record in the Court of Appeals, to and including the 16th day of April, 1907.

Directions to Clerk for Preparation of Transcript.

Filed March 13, 1907.

In the Supreme Court of the District of Columbia.

In Equity. No. 20802.

HORACE S. CUMMINGS, Administrator, Complainant,
vs.
CHARLES F. CONSAUL ET AL., Administrators, Defendants.

The Clerk of the Court will please include in the transcript of the record on the complainant's appeal from the decree of January 8th, 1907, in the above entitled cause, the following parts of the
14 record in said cause:

1. Memorandum of complainant's appeal from the decree of January 8th, 1907.

2. Citation on appeal of complainant from decree of January 8th, 1907, or memorandum thereof, which should show acceptance of service thereof by the solicitor for the defendants.

3. Memorandum of filing of complainant's appeal bond.

4. Memorandum of order of March 8th, 1907, extending time for filing transcript of record on complainant's appeal.

5. Complainant's exceptions filed May 31st, 1906, to Auditor's report filed May 1, 1906.

6. Complainant's exceptions filed January 4, 1907, to Auditor's report filed January 4, 1907.

TUCKER & KENYON,
Solicitors for Complainant.

15 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 10, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 20802, in Equity, wherein Horace S. Cummings, Administrator &c., is Complainant and Charles F. Consaul, *et al.*, &c., are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 15th day of April, A. D. 1907.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1779. Horace S. Cummings, adm'r, appellant, *vs.* Charles F. Consaul, *et al.*, &c. Court of Appeals, District of Columbia. Filed Apr. 16, 1907. Henry W. Hodges, clerk.

Henry W. Clagett,
Solicitor.

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1907.

No. 1779.

HORACE S. CUMMINGS, APPELLANT,

vs.

CHARLES F. CONSAUL AND IDA M. MOYERS, ADMINISTRATORS, APPELLEES.

BRIEF FOR APPELLANT.

CHARLES COWLES TUCKER,
J. MILLER KENYON,
For the Appellant.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 28466

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1907.

No. 1779.

HORACE S. CUMMINGS, APPELLANT,

vs.

CHARLES F. CONSAUL AND IDA M. MOYERS, ADMINISTRATORS, APPELLEES.

BRIEF FOR APPELLANT.

Statement of Facts.

This is an appeal by the complainant from a decree of the Supreme Court of the District of Columbia, sitting as an equity court, passed January 8, 1907, in a suit against Gilbert Moyers instituted by the appellant, Horace S. Cummings, administrator of George B. Edmonds, deceased, for a partnership accounting, and is to be heard and considered in connection with the appeal by the defendants from the same decree, which appeal is No. 1778 in this court.

The bill of complaint was filed September 16, 1899, by the appellant, as such administrator, against Gilbert Moyers

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1907.

No. 1779.

HORACE S. CUMMINGS, APPELLANT,

vs.

CHARLES F. CONSAUL AND IDA M. MOYERS, ADMINISTRATORS, APPELLEES.

BRIEF FOR APPELLANT.

Statement of Facts.

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The bill of complaint was filed September 16, 1899, by the appellant, as such administrator, against Gilbert Moyers

for an accounting and settlement of the affairs of the partnership which existed between Edmonds and Moyers in the prosecution of certain claims against the United States. Pending the long litigation, Moyers died, and his administrators were substituted as defendants.

Edmonds and Moyers, prior to 1888, had been separately engaged as attorneys and claim agents in the prosecution of claims against the Government. In February, 1888, they entered into the following agreement:

> Know all men by these presents, in duplicate, that the undersigned, attorneys of Washington, D. C., are special partners in the prosecution of the cases named in the schedule hereto attached, now pending before the United States Court of Claims and the Congress of the United States, the fee agreed to be paid by the client in each case being the percentum of whatever may be recovered, as is stated herein, and the agreement between the undersigned being that each shall have half of said fees and that each shall pay one-half of the expense incident to the prosecution of same, which expense is not to exceed two and a half per cent of the amount that may be allowed upon said claim.
>
> And it is hereby agreed and understood that the said Gilbert Moyers shall represent and be associated with me in the prosecution of said claims before the court of claims and the Congress of the United States as joint attorney of record.
>
> It is hereby understood and agreed that the undersigned, Gilbert Moyers, is to advance the expenses incident to the prosecution of said claims.
>
> Witness our hands this 6th day of February, 1888.
>
> (Signed) GILBERT MOYERS.
> (Signed) GEO. B. EDMONDS.

The bill of complaint, after alleging the death of Edmonds and the appointment of the appellant as administrator of his estate, averred that certain of the claims included in the schedule attached to the partnership agreement, resulted in judgments for recovery by the Court of Claims, the payment for which was provided for by the act of Congress of March 3, 1899, and that the defendant had

collected and wrongfully retained the fees contracted for therein. An exhibit attached to the bill, called "Exhibit No. 1," set out a list of the adjudicated partnership claims by names and numbers, with the date and amount of payment in each case. The sum total of the fees which had been collected by the defendant at the time the bill was filed, as recited in this exhibit, amounted to $26,380.25, of which the complainant claimed one-half under the terms of the partnership agreement. A separate allegation added three other cases to the list in which fees had not then been collected, but for which warrants and drafts were about to be issued and delivered to the defendant. Among the claims set out in the exhibit was that of R. W. Johnson, $2,105, paid June 24, 1899; the amount of fee, $1,052.50.

The bill further charged the refusal of the defendant to render any account of his collection of fees and expenses paid in connection with the prosecution of the cases.

The answer of the defendant admitted the agreement set out, but denied "that the cases named in the schedule attached to said agreement were those set forth in the schedule or list attached to the bill of complaint and marked Exhibit No. 1, and says that upon the best of his recollection and belief the only cases named in said Exhibit No. 1, which were among the cases specified in this schedule attached to said agreement of February, 1888, were the cases in which J. C. Tappan, administrator, and S. Fitzhugh, administrator, were claimants, respectively."

The defendant admitted the collection of the fees mentioned in the exhibit, but charged that Edmonds in consideration of money paid by the defendant in 1892, relinquished to the defendant all interest therein. On June 13, 1900, on the pleadings and exhibits and testimony taken before an examiner, the court passed a decree to the effect that a special partnership existed between the defendant and Edmonds by virtue of the partnership agreement, and "that said partnership related to the prosecution of the claims

mentioned and described in a schedule or list of claims which were therein referred to as attached to the said partnership agreement;" that the complainant was entitled to an accounting and to recover the balance found to be due, and the cause was referred to the auditor to take and state a partnership account.

On June 20, 1900, an order was made appointing receivers and directing the defendant to turn over to them all books and papers relating to the partnership, and to pay over to them the sum of $9,000. The defendant appealed from this last order, but the same was affirmed by this court on December 6, 1900. (See Moyers *v.* Cummings, 17 App. D. C., 269.)

Under the order of reference of June 13, 1900, the auditor filed his report on August 20, 1902. He reported the sum total of fees collected by Moyers to be $23,828.57, and that Edmonds was entitled to one-half of that sum. Against this one-half he charged the complainant $1,470, found to have been advanced to Edmonds, and reported the balance of $10,601.04 as due to the complainant as the representative of Edmonds. The defendant filed exceptions to the report. By a final decree, passed February 5, 1903, one of these exceptions was sustained, namely, the allowance of the fee collected in the case of R. M. Johnson, administrator of Samuel Herd, and all the others were overruled. Deducting the fee in the Johnson case from the balance found by the auditor, the court by this decree confirmed the report in all other particulars, and awarded a recovery against the defendant of $10,074.79, with interest from September 16, 1899, the date of the filing of the bill of complaint, until paid. The case was ordered retained, the right being reserved to the complainant to apply to the court for an order or orders for the payment of any other or further sums that might thereafter come into the hands of the defendant on account of other cases that were embraced in the partnership agreement, or in which collections had not been made at the date of the passage of the decree.

The defendant Moyers having died after the entry of this decree, his administrators, the present appellees, substituted themselves as parties defendant and prosecuted an appeal therefrom.

On such appeal the decree was reversed. (See Consaul *v.* Cummings, 24 App. D. C., 36.)

In reversing the decree this court held as follows:

1. That the partnership had not been dissolved by abandonment thereof by Edmonds.

2. That there was no valid and binding purchase made by Moyers of the interest of Edmonds in the partnership claims.

3. That the complainant had the right to bring the suit as administrator of Edmonds.

4. That the claims which had been adjudicated and appropriated for and in which Moyers had collected the fees up to the date of the filing of the bill and under the act of Congress of March 3, 1899, were partnership claims.

5. That the court would "not find from the opposing testimony that this schedule [the one produced by the complainant as the one referred to in the partnership contract] was deliberately prepared by Edmonds without foundation and for the purpose of defrauding Moyers."

6. That Moyers was not entitled to credit for fees paid to attorneys and agents in the matter of procuring legislation by Congress looking to the reference and payment of partnership claims.

7. That he was not entitled to credit for extra services.

8. That Moyers was entitled to credit in the accounting for one-half of the expenses incurred by him in the prosecution of unsuccessful partnership claims.

9. And that he was entitled to credit for interest from January 1, 1883, until September 16, 1899, on the $1,470 advanced by Moyers to Edmonds during the latter's lifetime.

Thus the decree was held to be correct, save in the last two particulars mentioned.

The case was remanded with directions to re-refer the case to the auditor that he might ascertain the credit to which Moyers' estate was entitled on account of the expenses incurred in the unsuccessful cases, and interest upon the $1,470, as stated.

During the period which elapsed between the passage of the decree of June 13, 1900, referring the case to the auditor, and the filing of the auditor's report on August 20, 1902, the act of Congress of May 27, 1902, appropriating money to pay this class of claims, was passed. Among the claims appropriated for were the following nine claims, which were mentioned and described in the schedule produced by the complainant as the schedule referred to in the partnership contract: Ernest Neill, administrator of Joseph Egner; William Goddard, Edward S. Nace, administrator of John M. Nace; Solomon Beery, John Young, R. H. Rue, administrator of Edward A. Alston, the executors of Thomas Kidd, the executors of Isaiah B. Beans, and John W. Fletcher.

Thereupon the receivers reported to the court the fact that these alleged partnership claims had been appropriated for and were about to be paid, and the court directed the receivers to collect and get in the fees. The report of the receivers and the order of the court are omitted from the record now before this court. Subsequently, the receivers made their report showing the collection of the fees in these cases, and this report is also omitted from the record.

The lower court then made another order, which is also omitted from the record, referring the matter of these nine claims to the auditor, and directing him to ascertain and report whether the fees so collected by the receivers were due

and payable to the defendants alone, or to the defendants and the complainant as administrator, and if the latter, to state the partnership account in the premises. The auditor by his report of January 5, 1904 (R., 1),* found all of the claims to be partnership claims; that the receivers had collected in fees $9,912.68, and had expended $3,481.68, leaving a balance in their hands of $6,430.82. From this balance he deducted the expenses of the reference, and $682 reserved for the determination of the claim of George M. Barber, a local attorney in Mississippi, who had intervened in the cause, claiming that he was entitled to a share in the fee in the Kidd claim, under a contract with Moyers, and found that the balance of the fund was $5,596.82. This fund he found to be distributable as follows: $3,788,55 to the appellant and $1,808.27 to the defendants (R., 7-9).

The auditor's report of January 5, 1904, remained unacted upon pending the determination of the last appeal in this court. This court finally disposed of the case on June 8, 1904.

Thereupon, on September 24, 1904, the complainant moved the lower court for an order referring the case to the auditor of the court in accordance with the mandate of the Court of Appeals; and about the same time the defendants filed a petition for leave to introduce further evidence (R., 66), and in this petition prayed "that the matters arising upon this petition and the order to be entered in this cause in pursuance of the said mandate of the Court of Appeals, and the exceptions of petitioners, now pending, to the auditor's last report in this cause, may be heard together and that upon such hearing the said exceptions may be sustained, and that upon the re-reference to be made to the auditor he may be directed to receive" the newly discovered evidence, and "that the court will allow all expenses paid by said Moyers in the prosecution of all cases embraced in said

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*References to the record on appeal are to the record in No. 1778, unless otherwise stated.

agreement which were pending and undetermined at the time of his death" (R., 71). At the time of the filing of this petition by the defendants, the defendants had excepted to the auditor's report filed January 5, 1904 (R., 61).

Thereupon the lower court made its order of January 21, 1905 (R., 74), denying so much of the defendants' petition as prayed for a re-reference to the auditor with directions to consider alleged newly discovered evidence; granting so much of the petition as asked for a re-reference to the auditor to ascertain and report the credits to which the defendants were entitled on account of expenses incurred by their intestate in pending as well as unsuccessful partnership claims; overruling certain of the defendants' exceptions and sustained certain of their exceptions to the auditor's report filed January 5, 1904, and re-committed the cause to the auditor.

Under this order of reference of January 21, 1905, the auditor filed a new report May 1, 1906 (R., 77), in which he modified his former report in accordance with the directions of the court and dealt with the new matters which had been referred to him.

In the meantime, a further Act of Congress had been passed, making another appropriation for the payment of this class of claims, and it was ascertained that three more of the claims mentioned in the schedule which had been produced by the claimant and which he claimed to be the schedule referred to in the partnership agreement, namely, Jane Edge, Lucy A. Caldwell, and Herbert Smith were appropriated for by this act of Congress. The original defendant, Gilbert Moyers, having died, it appeared that the defendants, his administrators, were prosecuting these claims and were about to collect the warrants or drafts to be issued in settlement of them and convert the proceeds to their own use. Thereupon, the receivers made a report of these facts to the court, and the complainant filed a petition praying that the matter of these three claims be referred to the auditor, and that he be directed to ascertain and report

whether they were partnership claims, and if so, to state a partnership account with respect to them. To the report of the receivers and the petition of the complainant, the defendants made a lengthy answer. But the report of the receivers, the petition of the complainant, and the answer of the defendants are not included in the record on the appeal. The order so passed by the court, however, is in the record and will be found at page 76. It was made November 7, 1905, and directed that the petition and report and answer be referred to the auditor to ascertain and report to the court whether the three claims in question were, in fact, partnership claims and what, if any, interest the partnership had in them, and if partnership claims, or if the partnership had any interest in them to state the partnership account in respect to them; and leave was granted to the defendants to assert before the auditor any claims that they might consider themselves to have for compensation for services in the prosecution of the claims after the death of their intestate, said compensation to be treated as a partnership expense (R., 76).

Under this order of reference, the auditor made his report of December 21, 1906 (R., 177). For the reasons stated therein, he found the claims to be partnership claims; and found there was due the complainant on account of fees collected therein by the defendants $964.99.

The defendants filed exceptions to this report on January 3, 1907 (R., 259).

On January 4, 1907, one George M. Barber filed a petition intervening in the cause. In this petition he claimed that he was employed by Gilbert Moyers to aid him in the prosecution of the claim of the executors of Thomas Kidd, and that Moyers had agreed to give him 10 per cent of the fee (R., 261). The complainant answered this petition stating that he had no knowledge of any such contract and averred that his intestate, Edmonds, had not employed or authorized the employment of the petitioner, George M. Barber and had no knowledge of his employment; and

claimed that the share of the fee due the estate of his intestate under the partnership agreement between him and Moyers was not chargeable with the payment of the claim of the intervenor (R., 264).

The defendants also filed an answer to this intervening petition denying the right of the petitioner to any share in the claim, saying that he had rendered no services whatever in obtaining or taking evidence in support of the claims (R., 265).

On December 26, 1906, the court made an order, by consent of all parties, finding that Barber, the intervening petitioner, was entitled to $201.90 in full payment for his services in the matter of the claim of the estate of Thomas Kidd. The receivers were directed to pay this sum to the intervenor, and the auditor was directed to ascertain whether this payment of $201.90 was chargeable against the partnership of Edmonds and Moyers, or against the defendants alone as administrators of Moyers, and further to ascertain and report how the $682 which had been reserved from distribution pending the determination of the Barber claim or the balance thereof remaining after the payment to him of the $201.90 should be distributed as between the complainant and the defendants (R., 258). On this last mentioned order of reference, the auditor reported January 4, 1907, that, following the directions of the former order of reference which required him to charge the amount paid to Montgomery, a local attorney employed by Moyers in the prosecution of the same claim, he was impelled to charge the $201.90 paid Barber as a partnership expense, and he charged that sum one-half against the complainant and one-half against the defendants.

The complainant thereupon excepted to this last mentioned report of the auditor upon the ground that the payment to Barber having been under a contract made by Moyers without the knowledge or consent of Edmonds, the

latter's estate was not chargeable with any portion of such payment (R., 261).

Thereupon the court on January 8, 1907, passed its final decree in this cause (R., 267) which was based upon the report of the auditor of May 1, 1906, and the exceptions thereto of the complainant and defendants; upon the report of the auditor of December 21, 1906, and the exceptions thereto of the defendants, and upon the report of the auditor of January 4, 1907, and the exceptions thereto of the complainant. All of the exceptions were overruled.

The decree made final disposition of the cause up to the date of its passage. Aggregating the principal and interest, of the sums due the complainant, which had been collected by the defendants and their intestate, the court by this decree found that $14,090.45, was so due, with interest until paid. The decree then declared how the fund in the hands of the receivers was distributable—following the report of the auditor—and directed that the portion of it distributable to the complainant should be paid him and that the portions payable to the defendants should be credited upon the $14,090.45, which was found to be due the complainant. This left a balance of $10,149.63, due the complainant from the defendants, and he was awarded a personal decree against them as administrators, for that sum.

The decree also directed the retention of the cause and reserved to the complainant the right to apply to the court from time to time for further orders for the payment of such other sums of money as might come into the hands of the defendants as administrators of Moyers on account of the partnership between Moyers and Edmonds.

Both the complainant and the defendants appealed from this decree. The appeal of the defendants is No. 1778 in this court and the appeal of the complainant is No. 1779.

Assignments of Error.

The court erred:

1. In sustaining, by the 6th paragraph of the interlocutory decree of January 21, 1905 (R., 75), the defendants' exceptions relating to the sum of $2,019 paid to W. M. Montgomery from the attorneys' fee paid by the claimants, setting aside the finding of the auditor that said sum should be wholly charged against the share of the defendants' intestate in said fee; in rereferring such matter, by section 3 of paragraph 9 of said decree (R., 75), to the auditor to ascertain and report what sum of money would be reasonable and proper to be allowed the defendants for and on account of the employment by their intestate of a local attorney in the prosecution of the said Kidd claim.

2. In sustaining the defendants' exceptions, by paragraph 7 of said decree of January 21, 1905 (R., 75), to the auditor's report in the matter of the claim of Isaiah Beans; in setting aside the finding of the auditor that the portion of said fee paid O. I. Thomas should be charged against the share of the defendants of said fee; and in rereferring said matter to the auditor, by section 3 of paragraph 8 of said decree (R., 75), to ascertain what sum of money would be reasonable and proper to be allowed the defendants for and on account of the employment by their intestate of a local attorney in the prosecution of said claim.

3. In directing the auditor, by section 1 of paragraph 9 of said decree of January 21, 1905 (R., 75), to allow the defendants interest on expenditures made by their intestate on account of expenses incurred by him in the prosecution of unsuccessful partnership claims.

4. In directing the auditor, by section 2 of paragraph 9 of said last-mentioned decree (R., 75), to allow the defendants

interest on expenditures made by their intestate on account of expenses incurred by him in the prosecution of claims pending at the time of his death.

5. In overruling, by the final decree of January 8, 1907 (R., 268), the complainant's first exception (R., 75) to so much of the auditor's report of May 1, 1906 (R., 77), as allowed the defendants credit for one-half of the alleged expenses incurred by their intestate in the preparation and filing of documents, such as calls and motions in the Court of Claims.

6. In overruling, by the final decree of January 8, 1907 (R., 268), plaintiff's second exception (R., 173) to so much of said report as found that a fee of 10 per cent of the amount recovered in the claim of the estate of Thomas Kidd was a fair and reasonable allowance for the employment of local counsel by Gilbert Moyers, and charged the defendant with an amount equal to one-half of 10 per cent.

7. In overruling, by the final decree of January 8, 1907 (R., 268), complainant's third exception (R., 71) to so much of the auditor's said last-mentioned report as found that a fee of $100 was a fair and reasonable allowance for counsel employed by defendants' intestate to assist him in the prosecution of the claim of the estate of Isaiah Beans, and charged the complainant with one-half of said $100.

8. In overruling, by the final decree of January 8, 1907 (R., 268), complainant's fourth exception (R., 174) to so much of the auditor's report as charged the defendants with one-half of $492, the fee received by their intestate in the matter of the claim of Joel C. Johnston, administrator, instead of one-half of $984, the amount of fee he would have received under the contract between George B. Edmonds, deceased, and the claimants, for he had not paid one-half of said fee to local counsel.

9. In overruling, by the final decree of January 8, 1907 (R., 268), plaintiff's exception to so much of the auditor's report of January 4, 1907, as charged the former partnership of Moyers and Edmonds with the payment of $201.90 paid the intervenor, George M. Barber.

First Assignment of Error.

This assignment of error relates to the distribution of the attorneys' fee in the matter of the claim of the executors of Thomas Kidd. This claim was appropriated for by the act of Congress of May 27, 1902, passed for the appointment of receivers in this cause. The appropriation to pay the claim was $13,460. The contract between Edmonds and the claimant was for an attorneys' fee of 50 per cent (R., 18). The auditor's report of January 5, 1904 (R., 3) gives a history of the claim.

It is not seriously questioned, apparently, by the defendants that this was a partnership claim. Besides being included in the schedule of partnership cases, the evidence shows, as recited by the auditor, that on May 15, 1886, the executors of Thomas Kidd executed and delivered to Edmonds their power of attorney, irrevocable and with power of substitution, authorizing him to prosecute the claim. Edmonds thereupon prepared the original petition for a reference to the Court of Claims and presented it to Congress on June 12, 1886. The claim was referred to the court and on April 13, 1888, a notice of the appearance of Moyers and Edmonds as attorneys for the claimant was filed in the case. These papers are part of the records of the court. The auditor's report of January 5, 1904 (R., 3-4), shows that when the claim was ready for payment, Montgomery, an attorney in Edwards, Mississippi, claimed to be entitled to a fee of 15 per cent of the amount allowed, under an agreement with Moyers. After much controversy and negotiating and after Moyers had consented, the 15 per cent of the amount allowed was paid by the receivers to Montgomery.

The complainants, however, reserved the right to object to the allowance of the amount so paid Montgomery from the partnership funds. This was on the theory that while Moyers, as the active and managing partner, could make a contract which would bind the partnership without the assent of his co-partner, yet on a partnership accounting, if he were not authorized to make such a contract, the amount paid out under it would be charged against him alone. For the reasons set forth in his report of January 5, 1904, the auditor found that Edmonds' share of this fee should not be charged with the payment to Montgomery. The defendants excepted to this action of the Auditor and the court by its decree of January 21, 1905, section 6 (R., 75), sustained their exceptions in this regard, and by section 3 of paragraph 9 of this decree, re-referred the matter to the auditor with directions not to charge the partnership with the amount paid Montgomery, but to ascertain what sum of money would be "reasonable and proper" to be allowed the defendant for and on account of the employment by their intestate of a local attorney, meaning Montgomery, in the matter of this claim of the executors of Kidd. Thus it will be seen that the court declined to hold that Edmonds' estate was bound by the contract made with Montgomery by Moyers, but held that Moyers had the right to expend from the partnership funds, a *reasonable* sum in the employment of Montgomery as a local attorney. Acting upon this direction, the auditor by his report of May 1, 1906, reversed his former finding and found that "under the order of reference to report what would be a fair and reasonable allowance to local counsel, I find and report that a fee of 10 per cent of the recovery in this case would be liberal compensation for the work performed by Montgomery, the entire testimony taken by him being contained in 26 printed pages or 271 typewritten folios" (R., 81).

Appellant contends under this assignment of error, that the amount paid Montgomery should be charged solely

against Moyers' share of the fee in this case, irrespective of the value of the services alleged to have been performed by Montgomery, in view of the provisions of the partnership agreement between Edmonds and Moyers (R., 67). The contract provided that Moyers was to advance the expenses incident to the prosecution of the claims, and that the expenses should not exceed 2½ per cent of the amount that might be allowed each claim. If this provision meant anything at all, it meant that Moyers should not have credit in any partnership accounting for advances made by him on account of expenses, for more than 2½ per cent of the recovery in any given claim. Moyers testified, as has been shown by the opinion of this court on the former appeal (24 App. D. C., 42-3) that the arrangement between himself and Edmonds was really an employment of himself, to attend to certain business for Edmonds in the Court of Claims in regard to certain cases, and one of his witnesses testified that the arrangement between the two was one by which Col. Moyers was to take charge of Mr. Edmonds' business. On the former appeal defendants strongly contended that Moyers by reason of Edmonds' failure to assist in the prosecution of claims was entitled to credit for extra services. This contention was denied by that court on the ground that Edmonds was "never called upon or even expected to do so," Moyers testifying as stated that he had simply been employed by Edmonds to attend to this business for him in the Court of Claims. If Moyers was not entitled to extra compensation for extra services performed by himself, it would seem necessarily to follow that he was not justified in employing some one else to do the work which he had agreed with Edmonds to do, at a cost which might exceed the amount that he was authorized to expend by the partnership agreement. To allow him credit for the employment of assistant attorneys, such as Montgomery was, would be to allow him to accomplish that indirectly which he has not been permitted to do directly. Was not the em-

ployment of a local attorney in a given case as much of an expense incident to its prosecution as the taking of depositions or the printing of briefs? What right had Moyers, without consulting Edmonds, or his personal representative or committee, to reduce Edmonds' share of the fee by employing local counsel and agreeing to pay him a large percentage of the amount to be awarded.

In this connection attention must be called to the peculiar circumstances which led to the making of the alleged agreement between Montgomery, the local attorney, and Moyers. As the auditor shows by his report of January 5, 1904 (R., 4), Moyers transferred the conduct of this Kidd claim to his daughter, Miss Ida Moyers, and under this transfer she claimed to be entitled to the fee. It was a gift to her by her father. She testified that in about the year 1895 she went into her father's office; that at that time "there was a general understanding with Colonel Montgomery providing that he was to receive a certain share in all cases that he handled at his end of the line (R., 59). She was positive that no special agreement was ever entered into with Colonel Montgomery relative to a fee in this particular case (R., 59) *until after an allowance was made in favor of the claimants by the Court of Claims.* She then sent to Montgomery a fee contract which he was to have signed by the claimants and by the terms of which Moyers was to be paid 50 per cent of the recovery (R., 58). This contract was dated November 20, 1900 (R., 61). Montgomery interlined in it in a provision that he was to receive 15 per cent of the recovery and returned it to Moyers (R., 58-59). As shown by the auditor in his report of January 5, 1904 (R., 4), when this contract was signed and returned by Montgomery, he had rendered all of his services in the matter, and such services had been rendered not under any specific employment by Moyers in this particular case, but "under a general understanding with Colonel Montgomery, providing that he was to receive a certain share in all cases that he handled at his

end of the line" (R., 59). Under these circumstances why should Edmonds' estate be charged with this payment to Montgomery which neither Edmonds nor any one representing him ever authorized expressly or impliedly; and how can the deduction of one-half of it from Edmonds' share of the fee be reconciled with the plain provisions of the partnership agreement limiting the expenses, which were to be advanced by Moyers, to 2½ per cent of the recovery.

So much for the contention that, irrespective of the extent and value of the services Montgomery performed, the amount paid him should not be charged against Edmonds. If the court should be of the opinion that Moyers, under the partnership contract, had the right to employ local counsel, even though payments to them might exceed the amount limited for expenses, and that he actually employed Montgomery to assist in the prosecution of this particular claim, then the question will arise, under the sixth assignment of error, whether the amount allowed by the auditor was a reasonable allowance.

Second Assignment of Error.

This assignment of error involves practically the same question as does the previous one. The attorneys' fee collected in the matter of the claim of the executresses of Isaiah H. Beans was $640 (R., 8). This fee was collected by the receivers, the claim having been appropriated for long after the filing of the bill of complaint. The auditor by his report of January 5, 1904, found that the claim was a partnership claim, the Court of Claims' record showing that on May 21, 1886, Edmonds, as attorney for the claimant, having filed in the Court of Claims various papers before Moyers became connected with it. O. I. Thomas, said to be a local attorney, asserted the right to a part of the fee under an agreement with Montgomery, dated December 4, 1885. The auditor found that in view of Edmonds' connection with the claim shown

by the records of the Court of Claims, and necessarily known to Moyers, the making of this agreement by Montgomery should not be allowed to prejudice the rights of Edmonds or his estate. As the auditor said, and his language is equally applicable to Moyers' employment of Montgomery in the Kidd case, "if Moyers chose to employ Thomas to perform the work of a local attorney in the case (which seems to have consisted in taking three printed pages of testimony) and to pay him one-half of the fee for that service, I do not see that Edmonds' share of the compensation should be diminished thereby" (R., 6). Under these circumstances the auditor found that the share of the complainants in the fee was not chargeable with any part paid to Thomas. The lower court, however, in this case acted as it had done in the Kidd case, and by its decree of January 2, 1905, directed the auditor to ascertain what sum of money would be *reasonable* and proper to be allowed to the defendants for and on account of the employment of a local attorney in the prosecution of the Beans claim, and to allow Moyers one-half of the sum so paid. The auditor, being thus directed, found by his report of May 1, 1886 (R., 82), that the allowance of $100 would be "more than ample," and the plaintiff was charged with one-half of such allowance.

It would seem to be unnecessary to add anything to the comment of the auditor, as quoted above, from his report of January 5, 1904, and to the argument made under the preceding assignment of error.

Third and Fourth Assignments of Error.

These assignments of error are based upon the action of the lower court in directing the auditor, by the interlocutory decree of January 21, 1905, to allow the defendants interest on advances made by their intestate on account of expenses incurred in the prosecution of unsuccessful and pending

claims. The court directed the auditor to allow interest on such advances from the time they were made until September 16, 1899 (R., 75), which was the date of the filing of the bill of complaint. The auditor, in obedience to this direction, computed the interest, and found that to that date it amounted to $483.76, and charged the complainant with one-half thereof, $241.88. In addition, he computed the interest on advances made by Moyers after the filing of the bill up to the time of his death, June 13, 1903, and found it to be $108.25, and charged the complainant with one-half of that sum, or $54.14 (pp. 82 and 84).

On the first accounting the complainant was allowed interest from the date Moyers should have accounted to him, namely, September 16, 1899, the date of the filing of the bill of complaint, and this court, in its opinion on the former appeal, after adverting to that fact (24 App. D. C., p. 49), stated that Moyers should be allowed, in the new accounting ordered, interest on the $1,470 advanced by him to Edmonds in 1892. But this court did not, in remanding the cause for another reference, direct that Moyers' estate should be allowed interest on advances made by Moyers for expenses in prosecuting the partnership claims. The court merely said that, in its view of the meaning of the partnership contract, it was "of opinion that Moyers is justly entitled to credit in the accounting for one-half of the expenses incurred by him in the prosecution of each of these unsuccessful cases" (24 App. D. C., p. 48), and remanded the cause in order that such credit might be given. If the court had believed that interest on the advances for such expenses should be allowed, presumably it would have said so.

But, assuming that this court did not consider the matter of interest on the former appeal, and the lower court had the right to enlarge the mandate of this court in this regard, should interest have been allowed on the advances made by Moyers on account of expenses? We respectfully urge that it should not have been, and to do so was unwarranted from

any point of view. The $1,470, on which interest was directed to be allowed, was advanced by Moyers, as he claimed, to Edmonds, not because he was required to do so by the partnership articles, but without regard to them, and Edmonds had the use of the money. Equitably, perhaps, his estate should be charged with interest on it. But the partnership contract itself expressly required Moyers to "advance the expenses incident to the prosecution of said claims." It made no provision for the allowance to Moyers of interest on his advances for such expenses, as it would have done if it had been in contemplation of the parties that such advances should bear interest; it was the plain duty of Moyers to make the advances, and under no possible interpretation of the contract was he entitled to a return of the money so advanced until the claims should be appropriated for and paid.

Where one agrees to advance money and another to furnish his services and skill in the prosecution of a joint enterprise, interest will not be allowed on the advances (Terrell *v.* Jones, 39 Cal., 655).

In the case at bar, Edmonds agreed to furnish the claims, and Moyers agreed to furnish his services and skill in prosecuting them and to advance the expenses to their prosecution. The two cases would seem to be parallel.

As a general rule, interest is not allowed upon partnership accounts until after a balance is struck on a settlement between the partners, unless the parties have otherwise agreed or acted in their partnership concerns. Until a balance is struck *there is no duty to pay over the money, and therefore a charge of interest as damages cannot be justified.*

Gilman *v.* Vaughan, 44 Wis., 649.
Dexter *v.* Arnold, 3 Mason, 284.
Lea *v.* Lashbrooke, 8 Dana, 214.
Day *v.* Lockwood, 24 Conn., 185.
Desha *v.* Smith, 20 Ala., 747.
Whitcomb *v.* Converse, 119 Mass., 38.
Beacham *v.* Eckford, 2 Sandf., Ch. 116.

This general rule rests upon the same principle applied by this court on the former appeal, that a partner is not permitted to charge against his copartner, in an accounting between them compensation for his more valuable or unequal services bestowed on the common concern without a special agreement.

It should be borne in mind that the auditor did not allow this interest to the partnership accounting until he was expressly directed to do so by the court.

Fifth Assignment of Error.

This assignment is based upon the allowance by the auditor of credit to the defendants for one-half of the expenses alleged to have been incurred by their intestate in the preparation and filing of documents—such as calls and motions—in the Court of Claims in the course of the prosecution of the partnership claims.

Specifically, the items objected to are as follows (R., 277):

Preparing and filing written appearances in 160 cases, at 15 cents each	$24.00
Preparing in duplicate and filing motions for calls by Court of Claims upon Executive Departments and clerk of House of Representatives; 257 motions, at 25 cents each, $64.25; 4 motions, at 20 cents each, 80 cents; 9 motions, at 15 cents each, $1.35	66.40
Preparing in triplicate and filing 138 notices to Department of Justice of taking of testimony on behalf of claimants, at 25 cents for each triplicate set	34.50
Preparing and filing miscellaneous motions, etc.	12.70
	$137.60

This court, on the former appeal, directed the allowance to Moyers, on the rereference it ordered, of one-half of the expenses incurred by him in the prosecution of the unsuccessful cases, and, seeing from the record before it, the difficulty of ascertaining accurately what such expenses were because of the way Moyers kept his accounts, it sanctioned an estimate of them, based upon these accounts, information to be derived from the records of the Court of Claims, and the general average of expenses in other cases of the same nature which had been ascertained and allowed (24 App. D. C., pp. 48, 49). But this court was careful to say: "This estimate should not include any part of the general office expenses of Moyers, as these are embraced in his undertaking to conduct the prosecution of the cases" (p. 49, *id.*).

The expense account submitted to the auditor by the defendants consisted of an elaborate statement prepared by one Neubeck, an employee of the defendants, and purporting to be the result of an examination made by him of the records of the Court of Claims and the records of the office of the late Gilbert Moyers. A summary of it appears on pages 272-277 of the record.

Neubeck testified, on cross-examination, concerning the items objected to, namely, charges for filing motions, calls, etc., that generally where such a paper was filed in the Court of Claims it was filed on a printed blank; that for filing such a blank he put in his statement 15 cents, except where it was in duplicate, when he put down 25 cents; that the motions and calls were signed by clerks; that, in witness' opinion, Moyers was entitled to the amounts stated for "the work of such clerk in preparing these motions, filing them, afterwards noting the replies, withdrawing them from the Court of Claims," etc. (R., 112).

The following is a part of the cross-examination of this witness:

"Q. Did you fix arbitrarily upon these charges of 15 and 25 cents per call, per brief, per motion?

"A. Well, I have taken into consideration the time which would be consumed by the clerk in the preparation of such motion and calls and of the work incident thereto, and have estimated what it would cost Colonel Moyers for their preparation based upon the average salary which I supposed prevailed in his office at that time.

"Q. So you have assumed from the knowledge you have of the salaries he paid after you went into his employ that you knew what salaries he paid to his clerk prior to your going into his employ, and upon this assumption you have as nearly as you could, fixed these items of charge of 15 and 25 cents per motion, etc.?

"A. I have approximated the salaries of such clerk not merely from what he paid until I entered his employ, but from what was told me by one of his former clerks" (R., 113).

While this court, as shown, sanctioned an estimate of expenses being made, and also said that it should be liberally made, it is submitted that by granting allowances, based upon the guess of a clerk of the defendants at what it cost in clerk hire to file a printed blank, when he only knew from hearsay what the clerk's salary was, was liberality carried to excess.

Strictly speaking, none of the claims for expenses made by the defendants, save those for the taking of depositions and for traveling expenses, should have been allowed. All the other items were for general office work done by Moyers at his office here in Washington. The Edmonds cases were only a part of his business, and his clerks, whose salaries were not shown, were engaged not on the Edmonds cases alone, but on all his other cases. By allowing his estate the cost of preparing and typewriting briefs, abstracts, and affidavits at regular typewriter rates, complainant is made to pay for part of the cost of his other work.

Sixth Assignment of Error.

If the first assignment of error is sustained it will be unnecessary to consider this one. If the auditor was wrong in his report of January 5, 1904, which charged the share of Moyers' estate in the Kidd fee with the full amount paid Montgomery, the local attorney, and the lower court was right in overruling his finding and rereferring the matter to him, with directions to find what would have been a reasonable sum to pay Montgomery, and to charge the sum so found to the partnership, then the question arises was 10 per cent of the amount recovered a fair and reasonable allowance for the employment of Montgomery? Under the first assignment of error, we have argued that under the partnership contract Moyers was not entitled to allowance in expenses advanced in excess of 2½ per cent of the recovery, and that the employing of a local attorney, such as Montgomery, was an expense. If we are wrong in this, we say that 10 per cent of the recovery was not a reasonable fee to pay Montgomery. The recovery was $13,460, the fee $6,730, and the allowance on account of the fee paid Montgomery was $1,346 (R., 8, 85). In his report of January 5, 1904, the auditor says, in discussing the employment of Montgomery by Moyers to aid him in the prosecution of this Kidd claim as follows: "In most of the claims included in my report filed in this case on the 20th of August, 1902, the practice of the defendant in the employment of local attorneys was to measure their compensation by the time of service, generally a per diem allowance. In many instances he personally performed the service, making claim for his traveling expenses only (R., 4)." No reason was shown by Moyers, and no reason has been shown by the defendants, his administrators, why if the employment of a local attorney in the Kidd case was necessary, one was not employed on a per diem basis as had been Moyers' custom in dozens of other cases, as shown by the record on the former appeal.

No particular circumstances were shown indicating that in the prosecution of this Kidd claim it was necessary or expedient to retain a local attorney and agree to pay him a large percentage of the recovery. Indeed, as Miss Moyers, to whom her father made a gift of this claim, testified, no actual contract of employment of Montgomery was ever made by Moyers, so far as this particular claim is concerned. As she says "there was a general understanding with Colonel Montgomery, providing that he was to receive a certain share in all cases that he handled at his end of the line" (R., 59). The truth of the matter probably is that Moyers, in the course of his business, received many claims for prosecution through Montgomery, in which cases Edmonds had no interest, and he found it to his interest to have Montgomery look after this Kidd case, which was in Montgomery's neighborhood. In return he received claims from Montgomery. Instead of making a specific contract with Montgomery for taking testimony in this particular case, he ignored the rights of his partner, Edmonds, treated the claim as his own, and let Montgomery attend to it on the same basis as Moyers attended to claims sent to Washington for prosecution by Montgomery.

The auditor, although directed by the court to ascertain what sum of money would be reasonable compensation to be paid Montgomery, which meant, if it meant anything at all, the reasonable cash value of the services actually performed by Montgomery, found that he was entitled to 10 per cent of the allowance, which was the percentage provided for in the general understanding as to all cases between Montgomery and Moyers. It is submitted that such a finding is unwarranted, and there is nothing in the record to show that the services of Montgomery were actually worth $1,346. The auditor, in his report of January 5, 1904, says: "Assuming that he had attended to the taking of all this testimony, the extent of his service is indicated by the fact that the volume of the depositions aggregates only

271 typewritten folios, or 26 printed pages. The simple statement of these conditions is sufficient answer to the averment that the services rendered is reasonably worth 15 per cent of the allowed claim" (R., 5). By his report of May 1, 1906 (R., 81), he found and reported "that a fee of 10 per cent of the recovery of this case would be a liberal compensation for the work performed by Montgomery, the testimony taken by him being contained in 26 printed pages, or 271 typewritten folios." There was no competent evidence taken before him to indicate that 10 per cent would be a reasonable fee.

Seventh Assignment of Error.

This assignment of error deals with the Isaiah Beans claim. As has been shown, the auditor, by his report of January 5, 1904, found that Edmonds' estate was not bound by the agreement made by Moyers with the local attorney, Thomas. Being, however, required by the court, in the order of reference, to ascertain what would be a fair and reasonable allowance, found that a fee of $100 would "be more than ample" (R., 82), and this "more than ample" fee was allowed by the court. As the auditor shows, Thomas attended to the taking of evidence, and the evidence comprised "three printed pages of testimony" (R., 82). It is submitted that the auditor's first report should be followed and not his second one, which he was constrained to make by the decree of the court. As shown in his first report, "if Moyers chose to employ Montgomery to perform the work of a local attorney in the case (which seems to have consisted in the taking of three printed pages of testimony), and to pay him one-half of the fee for that service, I do not think Edmonds' share of the fee should be diminished thereby" (R., 6). There is no testimony showing the reasonable value of the professional work performed by Thomas. Indeed, there is no testimony showing that he was a lawyer.

Eighth Assignment of Error.

This assignment of error concerns the distribution of the fee received by Moyers in the partnership claim of Joel C. Johnson. For the reasons set forth in his report of May 1, 1906 (R., 82-83), the auditor found that the claim was a partnership claim. Edmonds, as shown by the auditor's report, had a fee contract with the claimant of 50 per cent of the recovery. The amount of the recovery was $1,968 (R., 128). A draft was issued for that sum, dated July 5, 1902. Moyers received from one G. W. Lawrence 25 per cent of the face of the warrant (R., 27). This claim was included in the schedule of claims attached to the contract of partnership between Moyers and Edmonds (Former R., p. 22). Moyers testified concerning this claim, when asked what, if any, connection Edmonds had with it, that he did not "see anything in the papers disclosing his connection with the case." When asked whether he had any knowledge that he had any connection with it, "I cannot recollect any now." Asked whether he could say that it was a case covered by his agreement replied, "I think not." He added that he was prosecuting the claim in connection with G. W. Lawrence, a lawyer at Fayetteville, North Carolina, and that he divided the fees equally with him, "which would indicate that I must have received the case from him." Asked whether he could state as a fact that he received the case from him replied, "That is my impression. I will not state the fact without seeing the papers. That is all I know about it, what the papers show and my docket." He further stated that if he had a contract with the claimant he would look it up and produce it, but he never did so (Former R., pp. 150-151).

It would therefore appear that in this case, although it was plainly a partnership case, Moyers completely ignored that fact and made an agreement with Lawrence, a local attorney, by which Lawrence was to receive one-half of the

fee. For the reasons heretofore discussed in this brief in connection with the Kidd and Beans claims, it is submitted that Edmonds' estate should have credit in the partnership accounting for one-half of the 50 per cent fee agreed by the claimant to be paid. The auditor in his report charges Moyers' estate with only one-half of 25 per cent of the recovery instead of one-half of 50 per cent of the recovery. The result is that out of the total fee of $984, the local attorney, Lawrence, received, by reason of his contract with Moyers, $492, Moyers' estate $246, and Edmonds' estate $246, although it was Edmonds' case originally; he had a contract with the claimant, and Moyers had agreed that the fee should be equally divided. If the auditor was right in allowing the local attorney only $100 in the Beans claim, what justification is there for allowing Lawrence $492 in the Johnson claim?

Ninth Assignment of Error.

This assignment of error also deals with the distribution of the fee in the Kidd claim. During the pendency of this case one George M. Barber, a local attorney of Vicksburg, Mississippi, filed an intervening petition, in which he claimed that Moyers had agreed to give him 10 per cent of his fee in the Kidd case if he would assist him in its prosecution, and he asked that he be decreed to be entitled to $682 of the attorneys' fee paid in the Kidd claim (R., 261-3). To this petition the complainant, Cummings, replied that he had no knowledge of any such agreement having been made by Edmonds; that neither he nor Edmonds had ever employed Barber or had any knowledge of his employment, and claimed that the share of the fee due Edmonds under the partnership contract was not chargeable with the payment of the claim of Barber for services, if he had any (R., 264). Moyers' answer to the intervening petition denied that Barber had rendered any service in the

prosecution of the claim or that he was entitled to any part of the compensation (R., 266-7). The court, on December 26, 1906, decreed that Barber was entitled to $201.90 out of the Kidd fee in the receivers' hands in full payment for his services; directed the receivers to pay him that sum, and referred the matter to the auditor to ascertain and report whether the payment to Barber was chargeable against the partnership between Edmonds and Moyers or against the defendants alone as administrators of Moyers (R., 258). The auditor, treating the Barber claim to a portion of the fee in the Kidd case as similar to the Montgomery claim to a portion of the fee in the same case, and the court, having overruled his finding that fees paid to local attorneys under contract with Moyers should be charged against Moyers and not against the partnership, followed the directions of the former order of reference and his report thereunder on the payment to Montgomery, and reported the payment to Barber as a partnership expense (R., 261). Thus the share of Edmonds' estate in the fee in the Kidd claim was further reduced. In this connection the auditor's language used in connection with the Beans claim in his first report is worth repeating: "If Moyers chose to employ Thomas to perform the work of a local attorney in the case, I do not see that Edmonds' share of the compensation should be diminished thereby."

It is submitted that the decree of the lower court should be reversed on the complainant's appeal.

CHARLES COWLES TUCKER,
J. MILLER KENYON,
For the Appellant.

IN THE

Court of Appeals, District of Columbia

OCTOBER TERM, 1907.

HORACE S. CUMMINGS, Administrator of Estate of George B. Edmonds, deceased,
Appellant,
vs.
CHARLES F. CONSAUL *and* IDA M. MOYERS, Administrators of Estate of Gilbert Moyers, deceased,
Appellees.
} No. 1779.

BRIEF ON BEHALF OF APPELLEES.

R. GOLDEN DONALDSON,
Solicitor for Appellees.

VICTOR H. WALLACE,
Of Counsel.

IN THE

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OCTOBER TERM, 1907.

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} No. 1779.

BRIEF ON BEHALF OF APPELLEES.

In making reply to complainant's assignments of alleged error, it will be understood that the defendants below, as administrators of estate of Gilbert Moyers, stand upon their own presentation of the law and the facts as set forth in their own assignments of error and argument in support thereof, and with this preliminary statement we address ourselves to the complainant's assignments of error.

COMPLAINANT'S FIRST AND SIXTH ASSIGNMENTS.

As the first and sixth assignments of alleged error relate to the same phase of the case, we shall consider them together for convenience.

Complainant below excepts to the action of the Court below in setting aside the original report of the auditor to the effect that the total fee of W. A. Montgomery, local counsel in the Kidd claim, being $2,019.00, should be charged solely against the interest of Moyers in the Kidd fee, and in referring the matter back to the auditor with instructions to ascertain what would be a reasonable fee for Montgomery, such reasonable fee to be charged as a partnership expense. Complainant also excepts to the subsequent action wherein the auditor reported that 10 per cent of collection, amounting to $1,346.00, would be a reasonable fee to Montgomery for his services, and charged that sum against the Moyers-Edmonds partnership, the auditor reporting that the remainder of the fee paid Montgomery by the receivers, being $673.00, should be charged against Moyers' share, individually. This later report of the auditor was confirmed by the Court below.

At the outset we ask attention to the statement of complainant, in his brief in support of his appeal, under the first assignment, to the effect that defendants in this case apparently do not seriously question the Kidd claim being a partnership claim. We do emphatically deny that it is a partnership claim, and deny further, that there is any sufficient legal evidence in the record to warrant any holding that it was a partnership claim; it never has been admitted at any time by either Gilbert Moyers or by present defendants that this claim was ever embraced within the scope of the partnership agreement.

In the first place we ask attention to the fact that the agreement made between Moyers and Edmonds was an agreement between two Washington attorneys, and provided merely that Moyers should be associated with Edmonds in the prosecution of claims of the special partnership. It is but fair and reasonable to assume that said agreement was

entered into by the parties thereto, with a knowledge of what has been shown to have been a generally prevailing practice among claims attorneys of having local counsel act in securing witnesses and actually taking testimony. This custom is well established by the testimony of Col. Black and of Messrs. Snyder, Hott, Dye and Harvey. This being a fact it naturally follows that it must have been within the contemplation of the parties to said agreement that local counsel were to be employed when advisable in the partnership claims. Employment carries with it compensation, necessarily.

We may here mention, also, that the record furnished by complainant himself shows that *Edmonds personally* recognized this necessity for the securing of local counsel upon a contingent fee of a share of the total fee, because in the Fitzhugh claim, admittedly a partnership claim, *Edmonds himself* associated with him the firm of Little and Little, of Fredericksburg, Virginia, it being agreed that they were to have 10 per cent of collection for their services, and that this fee was paid to Little and Little by the receivers with out any question being raised. (We refer to pp. 6, 198, 219, 362, 363, and 364, orig. rec.)

This action of Edmonds himself would seem to dispose of complainant's contention, made under his sixth assignment, that Moyers could properly secure services of local counsel only upon a *cash* basis.

Referring to the other remarks of counsel for complainant under his sixth assignment, that the truth of the matter relative to the agreement with Montgomery by Moyers is *probably* that Moyers received many claims from Montgomery, etc., we have only to say that counsel for complainant is obviously drawing upon his imagination, rather than from the record, Had he desired to develop this theory he would have ascer-

tained that *Montgomery* in fact *never sent a claim* to Moyers, but was secured by Moyers as local counsel in a number of cases because of his high standing and wide acquaintance in his section of Mississippi.

As to the evidence showing how much was a reasonable fee to Montgomery, we refer to our brief in our appeal, where we have covered this phase of the case.

Further, in the last opinion of this Court, cash payments made to local counsel were mentioned as being among the expenditures to be charged against the partnership. It was assuredly to the interest of the partnership (if it still existed after the death of Edmonds, which we deny) to make arrangements when possible with local attorneys whereby they were to receive a contingent fee rather than cash payments. It is obvious from the large number of claims of the list furnished by complainant, which were dismissed by the Court of Claims, that the prosecution of these old Civil War claims is a practice of more than usual hazard and uncertainty. Nothing was received by Washington counsel save upon collection. It was therefore a matter of common sense to induce local counsel to share in this risk and uncertainty when possible to do so, rather than disburse actual cash to them in uncertain claims.

Further, *if* the Moyers-Edmonds partnership continued to exist after dissolution by Edmonds' death (which would be paradoxical) then Moyers, as surviving or continuing partner plainly had authority to make such further contracts as were necessary and reasonable to carry on the business, and therefore, he had authority to agree with Montgomery that Montgomery should be paid 15 per cent of collection in the Kidd case for his extensive and valuable services rendered.

It is argued by counsel for complainant that Moyers had no right to employ local associate counsel because Moyers himself agreed to do all the work incident to the prosecution

of the claims covered by the partnership. We will show that this contention is not well founded, however.

Edmonds first presented an agreement to Moyers for execution, which specifically proved that Edmonds should not be required to render any services in the prosecution of the claims save such as he might choose to render. (See p. 161, orig. rec.) Moyers, however, refused to enter into such an agreement and dictated instead the agreement which was finally signed, and which provided that Moyers should be "associated" with Edmonds in the prosecution of claims that evidently were to be agreed upon. This fact indicates on its face that Moyers insisted that the agreement should call for services on part of Edmonds. It is true that this Court said, when the case was previously before it, that the contemporaneous construction placed upon the agreement by the parties was evidently to the effect that Edmonds was not to be called upon to perform any services, but with all respect to this Honorable Court, we suggest that this Court, in using the language mentioned, overlooked the fact that said agreement was entered into on February 6, *1888*; that Edmonds was then in bad health (see test., Jas. B. Edmonds, p. 43, orig. rec.); that Edmonds shortly thereafter fell ill, and had to go to the Soldiers' Home, at Hampton, Virginia, where he was staying when he wrote the letter to Moyers on December 17, *1889*, wherein Edmonds promised to send on a list of his cases; that according to the testimony of complainant himself (p. 26, orig. rec.) Edmonds began as early as *1890* to show aberration of mind; and that Edmonds was adjudged insane in January, 1891 (p. 165, orig. rec.).

Now how, in the face of these facts, all proved by the witnesses for complainant in this case, could it be considered possible for Edmonds to have rendered any personal services worth mentioning, after he entered into the agreement with Moyers? It was *impossible* for him to have personally par-

ticipated in the prosecution of claims with Moyers, and therefore Moyers failure to protest against Edmonds' inaction can not be reasonably held to have been a waiver on Moyers' part of the right to insist on Edmonds' compliance with the terms of the agreement; these facts show that insistence on Moyers' part upon Edmonds' participating in the prosecution of the claims would have been futile. It was shortly after Edmonds had been adjudged insane but while he was suffered to go about as harmless that Moyers attempted to purchase Edmonds' rights under their agreement. After, as he thought, having bought out Edmonds, Moyers evidently lost sight of him, and did not thereafter consider that he had anything to do with him. In the light of these facts, which were not called to the attention of this Court previously, it is submitted that there is nothing in the record from which it can be fairly and reasonably inferred that Edmonds was not expected, when the agreement was made, to contribute his services; *on the contrary,* the reasonable inference is that the partners *did* contemplate that Edmonds *should* contribute his services, like any partner.

We therefore say that complainant is in error in asserting that it was understood between Moyers and Edmonds when they made their agreement that Moyers should do all the work; the very opposite is plainly the fact of the matter. We admit that it is a fact that Edmonds *did not* do any work to speak of, but his failure in this respect is accounted for by the facts to which we have above called attention, and the record does show that until he became incapacitated, physically and mentally, Edmonds did participate in the work then possible to be done in various cases.

Under said agreement Moyers was no more bound to perform all the work than was Edmonds, and therefore, when Edmonds ceased to render any services, during his lifetime, Moyers might have dissolved the partnership on that ac-

count, but Moyers did not consider that there was any necessity for a formal proceeding to dissolve the partnership, as he *thought* that he had dissolved it by purchasing Edmonds' interest. While Edmonds' previously adjudged insanity may have prevented Moyers from securing a valid transfer of Edmonds' interest, the attempted purchase is sufficient to show *why* Moyers did not insist, by proceedings in court or otherwise, upon a formal dissolution, on account of Edmonds' failure to perform the services evidently contemplated by the agreement itself.

It is plain that the securing of local counsel to secure and take testimony was proper on part of Moyers; that has been recognized in the opinion of this Court, and the necessity for so doing was recognized by Edmonds himself in the Fitzhugh claim. There is no room for question as to this.

It therefore only remains to determine whether or not the fee which the *claimant* specified should be paid to Montgomery, viz., 15 per cent of collection, was a reasonable fee, such as might have been acquiesced in by Moyers, in good faith. As shown in defendants' brief in support of their own appeal, the record shows that the usual and customary fee to local counsel is from *one-third* to *one-half* the total fee. In the Kidd case Montgomery ~~got~~ was allowed only *one-fifth* of the total fee, which as explicitly testified by disinterested witnesses, was a very reasonable fee. How, then, can complainant object to the payment to Montgomery of ~~*two-thirds*~~ one-third of ~~*two-fifths*~~ one-fifth of the total fee? Yet that is the burden of his complaint in these two assignments of error.

It was stated by this Court that the allowances to Moyers on account of expenses incurred in the prosecution of partnership claims should be

> "liberally made, in view of the fact that the large balance of fees for distribution is the result of Moyers' exertions and expenditures of money during the long

> period in which he was engaged in the prosecution of the claim. * * *"

We say that the Court below, in making the allowance to which complainant objects has not followed the above quoted instruction of this Court because the allowance made to Moyers in the Kidd case, so far from being "liberally made," does not even cover the actual expenditure to Montgomery, actually made by the receivers appointed by the Court below.

It is argued by complainant that effect should be given to that clause of the partnership agreement which restricts the expenses to 2½ per cent of the amount which may be allowed upon the claims, but we say that no effect can be given to said clause for the following reason:

Until the claim has actually been *tried* and *won* it is obviously *impossible* to say how much may be allowed. This is not only obvious but appears in the testimony of Col. Black (p. 103, sup. rec.), this witness having been engaged exclusively in this practice for over thirty years.

If the amount of allowance can not be foretold, it follows that there exists no basis for calculation as to how much 2½ per cent of allowance will be until *after* the allowance. Hence it is plain that this limit of expenses to 2½ per cent of allowance could not have been fixed as to expenses which must be paid or for which obligations must be incurred *prior* to the *allowance* by the Court of Claims. If said clause is to be given any effect at all, it could apply only to the expenses incident to actually collecting the *fees after* they had been earned. It may be here noted that the *receivers,* in collecting in the fees in the cases handled by them, expended more than 2½ per cent of allowances in some cases.

The testimony shows that Moyers never considered that Edmonds had any connection with the Kidd claim (p. 41, sup. rec.). Therefore he considered that he was acting for himself alone, never having been advised to the contrary by

Edmonds' committee or administrator until *after* an appropriation had been made to pay the Kidd claim. There is, therefore, no room to question Moyers' good faith in the premises when he assented to the fee agreement whereby Montgomery was to receive 15 per cent of collection, because Moyers thought he was acting for *himself alone* in so doing.

That the Court below did commit error in its division of the Kidd fee, we concede, but it was committed in holding that the Kidd claim was a partnership claim, and further in holding that any portion of Montgomery's fee should be charged against Moyers individually, while taxing only two-thirds of Montgomery's fee as a partnership expense.

We therefore submit that complainant's first and sixth assignments of error are not well taken.

Complainant's Second and Seventh Assignments.

Both of these assignments relate to the division of the fee in the Beans claim, and will therefore be considered together.

The total fee collected in the Beans case was $640.00, of which sum, one-half, or $320.00, was paid to Mr. Thomas, the local counsel, *by the receivers* of the Court below. It is shown that Moyers expended in cash, in the prosecution of this claim, the sum of $34.32. The receivers were allowed by the Court below 10 per cent of the total fee, or $64.00. The receivers' expenses in the case amounted to $4.00.

In the first instance the auditor held that as Moyers had no authority to charge the partnership for any services of local counsel, he should be held personally responsible for the amount so paid to Thomas. This, of course, meant that Moyers not only received nothing from the fee but must lose half his expenses, or $17.16, and must also lose half the receivers' fees and their expenses, or $32.00 plus $2.00, thus

making a total and actual *loss* to Moyers from the collection of the Beans claim, of *$51.16*.

This holding of the auditor was so palpably unjust and inequitable that the Court below upheld the defendants' exception to the report and sent the matter back to the auditor with instructions to report what sum would be a reasonable fee to Thomas, as local counsel, such fee to be charged against the partnership.

Upon the rehearing, the auditor reported that a reasonable fee to Thomas would be $100.00, and charged that sum against the partnership, and it is to this that complainant excepts. As shown in defendants' brief in support of their own appeal, the auditor erred and so did the Court below, in holding that $100.00 was a reasonable fee to Thomas, as the evidence showed that from *one-third* to *one-half* of the total fee would have been a reasonable fee, while the amount allowed as a reasonable fee was less than *one-sixth* of the total fee.

Let us analyze the division of the fee in the Beans case as last made by the auditor and approved by the Court below.

The share of Edmonds as originally stated by the auditor is reduced by half the sum found to be a reasonable fee to Thomas, and is also reduced by half the amount of the receivers' fees and expenses, making a total deduction of $101.16 from $320.00, thus leaving *net* to Edmonds' estate, the sum of *$218.84*.

This left a balance of $50.00 to be credited to Moyers, who paid out $17.16 on account of expenses (being half of total expenses). Half the receivers' fees and expenses amounted to $34.00. Adding these sums together, we have a total expense of *$51.16*, and a total credit of *$50.00*, for Moyers' account. In other words, by winning and collecting the Beans claim, Moyers *lost $1.16*, besides all his time and labor.

And yet the complainant, in an *equity* suit, has the hardi-

hood to complain because he did not get *all* the fee collected for services which were rendered by *Moyers,* and complains because Moyers was not made to lose an *additional* $50.00 by reason of having toiled with the Beans case for some fourteen years. In short, for doing *nothing,* Edmonds' estate gets from the Beans claim the sum of $218.84 net, and Moyers, for doing the *work,* gets the *minus* sum of $1.16. According to the theory of complainant, had Moyers won many such claims after his years of labor, he would have been bankrupted, as the more he won, the more he would have owed; the harder he worked, and more successful he was, the greater his losses.

Defendants below admit that the Court below erred in this matter, in giving to complainant as much as was given him, and therein only. If the Beans case was a partnership claim, then the Court below should have ascertained the reasonable value of services rendered therein prior to the dissolution of the partnership by Edmonds' death and should have allowed complainant one-half of that reasonable value, less one-half the expenses incurred to that date.

It is submitted that complainant's second and seventh assignments are not well taken.

Complainant's Third and Fourth Assignments.

We see no occasion for dividing the third and fourth assignments of error, as they relate to the same matter, viz., allowance of interest to estate of Moyers upon expenses incurred by Moyers in claims which had been either dismissed before Moyers' death or which were then pending undetermined.

As to allowance on account of *expenses* in dismissed claims, that was provided for by the decision of this Court, though nothing was said one way or the other as to interest. It is a matter of common knowledge that money is worth

interest, however, and we can see no reason in fairness why Moyers should not be allowed interest on his disbursements, *especially* when that interest is to be taken from the *very money* which his own services and expenses have secured. Moyers took all the risk in expending money for the expenses incident to the prosecution of the claims. If he never collected any claims it is obvious that he never would have been reimbursed for those expenses, as Edmonds' estate was insolvent. When, therefore, money was brought in by Moyers' services and as the result, in part, of his expenditures, why should he not be allowed interest in this partnership accounting? There is nothing in the partnership agreement against the allowance of interest, and therefore it is obvious that the money spent by Moyers was equally money paid for himself and money laid out and expended for the use of Edmonds, and this, even at law, would carry interest. As was stated by this Court, the estate of Moyers should be treated liberally as all the assets of this perennial special partnership were the result of Moyers' expenditure of cash and labor.

This Court did not pass upon the matter of expenditures in cases which were pending at time of the death of Gilbert Moyers, because they were not brought specially before this Court, but the same reason that required the allowance to Moyers' estate of expenses incurred in dismissed claims, would require the same allowance in cases which were pending at the death of Gilbert Moyers, because so far as concerned Gilbert Moyers, the pending claims were unsuccessful claims, as *he* never collected them, and could *never* collect them by reason of his death.

There is no distinction that can be drawn between the claims which had been dismissed before Moyers' death and those which were left uncollected and untried at time of his death, because neither of said classes of claims could ever be realized upon by the partnership.

Certainly it can not be said that the Court below, in allowing interest on these expenditures, abused any discretion or worked any injustice to the complainant. *Anything* that complainant gets out of this litigation will be so much *clear profit* to Mr. Cummings, individually, as is shown by the record. We refer to the testimony of Mr. Cummings, himself, on pages 50, 51, and to the assignment made to Mr. Cummings by James B. Edmonds, half brother and next of kin to George B. Edmonds, of all his right, title and interest in the personal estate of said George B. Edmonds, found on page 53, orig. rec.

The testimony of Mr. Cummings, the complainant, shows in a very general way that Edmonds' estate owed him a few hundred dollars for money expended for Edmonds' benefit during his insanity. Aside from securing a reimbursement of some trifling amount, the complainant will make as clear gain, every dollar that is allowed him in this suit.

We feel justified in adverting to these facts, shown by the testimony of complainant himself, because it is plain that any doubts which may exist in the minds of this Court as to any point presented in this cause, should, in equity, be resolved in favor of the *defendants,* as administrators of Gilbert Moyers, the man who did the *work,* and *not* in favor of *complainant* in this, a *plainly speculative suit.*

Referring to the case of Terrell vs. Jones, 39 Cal., 655, cited by counsel for complainant, and to his attempted application of that decision to the case at bar, we deny its applicability. In that case, as stated by complainant, one party furnished the money, and the other the services and skill. In the case at bar it is true that Moyers was taken in as a partner by Edmonds, on account of his skill, but it was nevertheless agreed that *both* parties to their agreement should contribute their services, Moyers advancing the money necessary for expenses. It is also true that Edmonds was to furnish the claims, and he did furnish *some,* but not all al-

leged by complainant, by any means, and even as to those he did furnish, he ceased to contribute them when he died, and could not control many of those he thought were his, even during his lifetime. This is shown by the large number of so-called Edmonds claims that were prosecuted by lawyers other than Moyers.

As to a general rule, as laid down by complainant, in his brief, that a balance on a partnership account can not draw interest until the balance is struck on a settlement between the partners, we are willing to accept that as a correct exposition of the law, if complainant is, and *under that rule,* complainant can claim no interest on any portion of his claim in this case, *prior* to the entering of the decree in this case which shall become final, because there can be no *balance* struck between complainant and the defendants save after a judicial inquiry. This rule applied to the case at bar would show that complainant is not entitled to any interest, on anything, prior to the entering of the final decree in this cause in January, 1907, and when that decree shall have been reversed, his right to claim any interest must be deferred as inchoate, until another final decree shall have been rendered.

We are willing to concede the correctness of such a rule, provided it is to be applied for and against *both* sides to this controversy.

We admit that counsel for complainant is right when he says that as a general rule, one partner is not entitled to claim any extra compensation from the other partner on account of his own more valuable or more extensive services; that is the law, but as we have shown in our brief in support of our appeal, that rule is inapplicable to a case in which one partner carries on a partnership business after the death of his co-partner, as it has been held by numerous courts of last resort that in *that* event, the surviving partner *is* entitled to be paid out of the business, for his services

rendered after the dissolution of the partnership by the death of his co-partner. We have fully covered that portion of the law in our brief on our own appeal.

It is submitted that the complainant's third and fourth assignments are not well taken.

Complainant's Fifth Assignment.

This assignment is the statement of complainant's objection to the report of the auditor and to the decree of the court below in allowing credit to the estate of Moyers for the reasonable cost of preparing and filing several hundred motions, etc., in the Court of Claims, in claims alleged by complainant to have been partnership claims.

The auditor reported that he did not deem the preparation of these motions and calls as coming within the term "ordinary office expenses," as used by this Court in its opinion, and therefore he allowed credit for the preparation of these motions and calls, in a small sum, as summarized on page 277, sup. rec., the amount covered by this assignment being $137.60.

The amount asked and proven by defendants relative to these motions was almost nominal, and the allowance of said expenses was plainly proper, whence it follows that complainant's fifth assignment is not well taken.

Complainant's Sixth and Seventh Assignments.

These assignments have been above considered, in connection, respectively, with the first and second assignments.

Complainant's Eighth Assignment.

This assignment relates to division of the fee in the case of Joel C. Johnson, administrator of estate of Richard W. Johnson. The amount collected on this claim was $1,968.00 (Aud. Rept., p. 83, sup. rec.)

The testimony of Gilbert Moyers (pp. 150-151, orig. rec.) shows that he prosecuted this claim in connection with one Lawrence, of Fayetteville, N. C., as local counsel. As stipulated by counsel in this cause (p. 147, sup. rec.), Gilbert Moyers received his fee of 25 per cent of collection in this case, amounting to $492.00 *through the hands of Lawrence.* In other words, *Lawrence* was the one who collected the total attorney fee, and *he* remitted to Moyers said sum of $492.00. The auditor and the court below divided said sum so received by Moyers between Moyers and Edmonds.

The position of complainant is this:

As *Edmonds* had a fee agreement for 50 per cent of collection (which agreement the record shows *he kept in his own possession,* and which agreement never came into Moyers' hands at any time) Moyers *ought* to have collected a fee of 50 per cent, and, therefore, all that Moyers did collect ought to be now paid over to complainant, as administrator of Edmonds. Complainant's demand in this particular is characterized by the same shrinking modesty which is found to pervade all his claims in this suit. He merely asks that he, *who did nothing,* be paid *all* the fee, and that *Moyers, who collected the claim* be left *nothing;* this is *all* that complainant asks, *and this in a court of equity!*

As shown in defendants' brief in support of their own appeal, there is no sufficient evidence to show that this Johnson claim ever was a partnership claim. Even if it were a partnership claim, Moyers had a perfect right to associate with him a local attorney. It so happened in this case that the whole attorney fee passed into the hands of that local attorney, who remitted 25 per cent of collection to Moyers. There is nothing in the record to show specifically what the actual fee was that was collected by the local attorney, but in any event it would be repugnant to common sense or fairness to say that, because *Moyers* did not insist upon a settlement

with claimant *based* upon a fee contract with *Edmonds,* that Moyers never had in his possession, and of which it would appear he had no knowledge, Moyers should be required to pass over to complainant *all* the fee that he received. This contention of the complainant is so palpably absurd as to call for no further comments. It can not be that it is made in seriousness because it is absolutely *ridiculous.*

Complainant's Ninth Assignment.

This assignment relates to the action of the court below in charging against the partnership the sum of $201.90, paid to Barber, intervenor in the case so far as concerned the Kidd fee, for local services.

The services which Barber was asked to render in the Kidd case were obviously necessary, and such as Moyers had a right to secure from any local person. That Barber looked up witnesses and had their testimony taken and sent to the clerk of the Court of Claims was shown in evidence. The court below decreed that the reasonable value of these services were $201.90. That is all there is to this phase of the case. Complainant, as usual, however, contends that he should have at least half the fees collected, but should be charged with nothing.

We do not think argument needed to convince this court that such payments, made to local counsel, should, of course, be charged against the firm, *if* made in a partnership case.

This assignment is plainly not well made.

CONCLUSION.

In concluding our comments upon the assignments of alleged error set up by the complainant below, we can not forbear saying that it is apparent that most, if not all of these nine assignments by complainant are made in the hope that by asking *everything* that can be thought of, even

by one most diligent in conceiving claims and demands, this court may be induced to allow *something* to complainant on account of his numerous assignments of error. Most of these assignments are men of straw, clearly designed for no purpose than to be knocked down. None of the assignments are such as can commend themselves to the sense of fairness of this court, with all the facts and the law before it, and they should one and all be overruled, and the cause should be remanded for further proceedings as prayed by defendants in their own appeal, and the costs of appeal should be taxed against complainant.

Respectfully submitted,

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Of Counsel.